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## Notice of Intended Regulatory Action (NOIRA) Agency Background Document

<b>Agency name</b>	Department of Mines, Minerals and Energy
<b>Virginia Administrative Code (VAC) citation</b>	4 VAC 25 - 130
<b>Regulation title</b>	Virginia Coal Surface Mining Reclamation Regulations
<b>Action title</b>	Amendments regarding the administrative hearing process, consistency with federal regulations, stream channel design, and civil penalties
<b>Document preparation date</b>	April 28, 2005

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Purpose

*Please describe the subject matter and intent of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.*

Amendments of the administrative hearing regulations in the Coal Surface Mining Reclamation Regulations (4VAC25-130-700.12, 773.21, 775.11, 800.51, 842.15, 843.12, 843.13, 843.15, 845.18, and 845.19) are being made to revise the Virginia Code Section numbers regarding the Virginia Administrative Process Act to the renumbering that became effective October 1, 2001. This is to ensure that the agency, industry, and public are provided with the correct and updated section references of the Virginia Administrative Process Act.

Amendments to 4VAC25-130-775.11, 775.13, 800.51, 843.13, 843.16, and 845.19 are made to provide direction as to where requests for formal administrative review and notices of judicial appeal shall be filed. These will ensure a consistent administrative and judicial review process for all parties to a contested action/decision.

Amendments to 4VAC25-130-784.20 and 817.121 are made to be consistent with the corresponding federal amendments regarding survey requirements and the rebuttable presumption of subsidence determinations. The U. S. Court of Appeals vacated the federal rules

on April 27, 1999; whereupon, the Federal Office of Surface Mining suspended its rules effective December 22, 1999. As provided by 4VAC25-130-700.2 of the Virginia Coal Surface Mining Reclamation Regulation, *“These regulations are promulgated pursuant to Chapter 19, Title 45.1 of the Code of Virginia (1950) as amended. In order for these regulations to receive approval by the United States Secretary of the Interior as part of the Commonwealth's permanent regulatory program, the Federal Surface Mining Control and Reclamation Act requires that these regulations be consistent with (as effective as) applicable regulations issued by the Secretary, contained in 30 CFR Chapter VII.”*

Sections 4VAC25-130-816.43 and 817.43 are being amended to allow the approval of natural stream restoration channel design, as approved by the U.S. Army Corps of Engineers. This will allow the restoration of an impacted stream channel to one that is more natural and environmentally sound.

Section 4VAC25-130-816.105 is being amended to ensure it addresses “thick overburden” conditions. The current version is essentially a duplication of 4VAC25-130-816.104, which pertains to “thin overburden” conditions. The amendment will ensure the Virginia regulation is consistent with the federal rule, 30 CFR 816.105.

Chapter 3 of the 2005 Virginia Acts of Assembly (HB 2573) increased the civil penalties for violations of the Virginia Coal Surface Mining Control and Reclamation Act that result in a personal injury or fatality. Sections 4VAC25-130-845.13, 845.15, and 846.14 of the regulations are being amended to provide that a civil penalty up to \$70,000 may be assessed for a violation that results in personal injury or fatality.

## Legal basis

*Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.*

The Department of Mines, Minerals and Energy (DMME) has authority to promulgate this regulation under authority found in § 45.1-161.3, Powers of the Department, § 45.1-230, Authority and duties of Director, and § 45.1-242, Performance standards.

- Section 45.1-161.3 empowers DMME, with the approval of the Director, to promulgate regulations necessary or incidental to the performance of duties or execution of powers under Title 45.1 of the Code of Virginia.
- Section 45.1-230 of the Code of Virginia empowers the DMME Director to promulgate regulations as may be necessary to carry out the provisions of the Virginia Coal Surface Mining Control and Reclamation Act, chapter 19 of Title 45.1 of the Code.
- Section 45.1-242 of the Code of Virginia directs the DMME Director to, by regulation, establish performance standards applicable to all surface mining and reclamation operations. Establishment of these performance standards by regulation is mandatory.

**Substance**

*Please detail any changes that will be proposed. For new regulations, include a summary of the proposed regulatory action. Where provisions of an existing regulation are being amended, explain how the existing regulation will be changed. Include the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. Delineate any potential issues that may need to be addressed as the regulation is developed.*

The Department of Mines, Minerals and Energy is proposing amendments to sections of the 4VAC25-130 Coal Surface Mining Reclamation Regulations as described in the following table.

<b>Current section number</b>	<b>Proposed new section number, if applicable</b>	<b>Current requirement</b>	<b>Proposed change and rationale</b>
4VAC25-130-700.12(e)	N/A	Administrative hearings are to be conducted in accordance with the Virginia Administrative Process Act.	Change Virginia Code section from 9-6.14:1 to 2.2-4000A to reflect the renumbering of the Administrative Process Act, which became effective Oct. 1, 2001.
4VAC25-130-773.21(c)	N/A	Administrative hearings are to be conducted in accordance with the Virginia Administrative Process Act.	Change Virginia Code section from 9-6.14:1 to 2.2-4000A to reflect the renumbering of the Administrative Process Act, which became effective Oct. 1, 2001.
4VAC25-130-775.11(b)(1)	N/A	Administrative hearings are to be conducted in accordance with the Virginia Administrative Process Act.	Change Virginia Code section from 9-6.14:12 to 2.2-4020 to reflect the renumbering of the Administrative Process Act, which became effective Oct. 1, 2001.
4VAC25-130-775.11	(d)	Requests for administrative review of the agency’s decision shall be filed with the Director or his designee.	Add subsection “d” to inform that requests for hearings and appeals for review and reconsideration be filed with the Director to be consistent with similar regulations under the Act.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
4VAC25-130-775.13	(c)	Notice of appeal for judicial review would be filed with the Director or his designee.	Add subsection “c” to inform that a notice of appeal for judicial review of a Hearing Officer’s final decision or final decision on review and reconsideration be filed with the Director to be consistent with similar regulations under the Act.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
4VAC25-130-784.20(a)(3)	N/A	<p>A permit applicant is required (unless denied access for such purposes by the owner) to conduct a survey of certain features, which were within the area that may be adversely impacted by proposed underground mine works (within a specific angle of draw from the outer most extent of). The features included non-commercial buildings, occupied dwellings and related structures, drinking, domestic and residential water supplies. The permit applicant was also required to notify owners of such features that a denial of access would remove the rebuttable presumption that subsidence from the operation caused any postmining damage to protected structures.</p>	<p>The U. S. Court of Appeals vacated the Federal rule on 4/27/1999 and the Federal Office of Surface Mining suspended its rule effective December 22, 1999. The regulation is amended to remove this subsection to be consistent with the Federal Rule (30 CFR 784.20(a)(3)) that became effective as of Dec. 22, 1999 (64 FR 71652)</p>

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
4VAC25-130-800.51(c)(1)	N/A	Administrative hearings are to be conducted in accordance with the Virginia Administrative Process Act.	Change Virginia Code section from 9-6.14:12 to 2.2-4020 to reflect the renumbering of the Administrative Process Act, which became effective Oct. 1, 2001.
4VAC25-130-800.51(e)	N/A	Requests for administrative review and notice of appeal for judicial review of the agency’s decision shall be filed with the Director or his designee.	Revise to replace “Division of Mined Land Reclamation” with “Department of Mines, Minerals and Energy” for clarification.
4VAC25-130-816.43(d)	(d) & (e)	Stream channels are required to be reconstructed in accordance with the specific requirements set forth in this rule.	<p>After subpart (c), add a new subsection (d) and rename the current (d) to (e):</p> <p><u>“(d) In lieu of the requirements of paragraphs (a)(2) through (a)(9), (b)(2) through (b)(6) and (c)(1) through (c)(3) of this section, a natural stream restoration channel design approved by the U.S. Army Corps of Engineers as part of an approved U.S. Army Corps of Engineers permit shall be deemed to meet the requirements of this section.</u></p> <p><u>(e) Steep slope conveyances.”</u></p> <p>This change in the Virginia Rule will allow the approval of natural stream restoration channel design approved by the U.S. Army Corps of Engineers.</p>

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
4VAC25-130-816.105(a) & (b)	N/A	The current regulation does not address “thick overburden” but instead reiterates the requirements for “thin overburden” situations of 4VAC250130-816.104. .	Correct the regulation so that it addresses “thick” overburden to be consistent with the Federal Rule (30 CFR 816.105). Thin overburden is addressed under Virginia Rule 4VAC25-130-816.104 and 30 CFR 816.104.
4VAC25-130-817.43(d)	(d) & (e)	Stream channels are required to be reconstructed in accordance with the specific requirements set forth in this rule.	<p>After subpart (c), add a new subsection (d) and rename the current (d) to (e):</p> <p><u>“(d) In lieu of the requirements of paragraphs (a)(2) through (a)(9), (b)(2) through (b)(6) and (c)(1) through (c)(3) of this section, a natural stream restoration channel design approved by the U.S. Army Corps of Engineers as part of an approved U.S. Army Corps of Engineers permit shall be deemed to meet the requirements of this section.</u></p> <p><u>(e) Steep slope conveyances.”</u></p> <p>This change in the Virginia Rule will allow the approval of natural stream restoration channel design approved by the U.S. Army Corps of Engineers.</p>

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
<b>4VAC25-130-817.121</b>	N/A	(c)(4) (i) through (iv) of the regulation provided that if damage to any non-commercial building or occupied residential dwelling or structure related thereto occurred as a result of earth movement within an area determined by projecting a specific angle of draw from the outer most boundary of an underground mine workings to the surface of the land, a rebuttable presumption would exist that the permittee caused the damage.	The U. S. Court of Appeals vacated the Federal rule on 4/27/1999 and the Federal Office of Surface Mining suspended its rule effective December 22, 1999. This change will revise subpart (c)(4) of Virginia’s Rule to be consistent with the Federal Rule by deleting subsections 4(i) through (iv).
<b>4VAC25-130-842.15(d)</b>	N/A	Administrative hearings are to be conducted in accordance with the Virginia Administrative Process Act.	Change Virginia Code section from 9-6.14:1 to 2.2-4000A to reflect the renumbering of the Administrative Process Act, which became effective Oct. 1, 2001.
<b>4VAC25-130-843.12(j)</b>	N/A	Administrative hearings are to be conducted in accordance with the Virginia Administrative Process Act.	Change Virginia Code section from 9-6.14:1 to 2.2-4000A to reflect the renumbering of the Administrative Process Act, which became effective Oct. 1, 2001.
<b>4VAC25-130-843.13(b)</b>	N/A	Administrative hearings are to be conducted in accordance with the Virginia Administrative Process Act.	Change Virginia Code section from 9-6.14:12 to 2.2-4020 to reflect the renumbering of the Administrative Process Act, which became effective Oct. 1, 2001.
<b>4VAC25-130-843.13(e)</b>	N/A	Requests for administrative review and notice of appeal for judicial review of the agency’s decision shall be filed with the Director or his designee.	Revise to replace “Division of Mined Land Reclamation” with the “Department of Mines, Minerals and Energy” for clarification.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
4VAC25-130-843.15(c)	N/A	Administrative hearings are to be conducted in accordance with the Virginia Administrative Process Act.	Change Virginia Code section from 9-6.14:11 to 2.2-4019 to reflect the renumbering of the Administrative Process Act, which became effective Oct. 1, 2001.
4VAC25-130-843.16(e)	N/A	Requests for administrative review and notice of appeal for judicial review of the agency’s decision shall be filed with the Director or his designee.	Revise to replace Division of Mined Land Reclamation with the Department of Mines, Minerals and Energy for clarification.
4VAC25-130-845.13	N/A	Cessation Orders must be assessed civil penalties and notices of violation may be assessed civil penalties. In determining a penalty assessment a point system is used. The maximum daily penalty for a violation is \$5,000.	<p>This part is amended to correct typographical errors in (c)(1), (d).</p> <p>Subparts (e)(1) and (f) are amended to meet the requirements of HB 2573, enacted as emergency legislation in Chapter 3 of the 2005 Virginia Acts of Assembly. The maximum civil penalty was increased from \$5,000 to \$70,000 for a violation that resulted in injury or a fatality of a person. The penalty for an violation resulting in personal injury or fatality would exclude the history consideration and the penalty would be determined by multiplying the base penalty value (maximum of \$3,500) under the point system by a factor of 20, not to exceed \$70,000 per violation.</p>

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
<b>4VAC25-130-845.15</b>	N/A	Cessation Orders must be assessed civil penalties and notices of violation may be assessed civil penalties. In determining a penalty assessment a point system is used. The maximum daily penalty for a violation is \$5,000. The Division may assess separately a civil penalty for each day from the date of issuance of the notice of violation or cessation order to the date set for abatement of the violation.	This rule is amended to meet the requirements of HB 2573, enacted as emergency legislation in Chapter 3 of the 2005 Virginia Acts of Assembly. The maximum civil penalty was increased from \$5,000 to \$70,000 for a violation that resulted in injury or a fatality of a person.
<b>4VAC25-130-845.18(b)(1)</b>	N/A	Administrative hearings are to be conducted in accordance with the Virginia Administrative Process Act.	Change Virginia Code section from 9-6.14:11 to 2.2-4019 to reflect the renumbering of the Administrative Process Act, which became effective Oct. 1, 2001.
<b>4VAC25-130-845.19(c)</b>	N/A	Administrative hearings are to be conducted in accordance with the Virginia Administrative Process Act.	Change Virginia Code section from 9-6.14:12 to 2.2-4020 to reflect the renumbering of the Administrative Process Act, which became effective Oct. 1, 2001.
<b>4VAC25-130-845.19(e)</b>	(e)	Requests for administrative review and notice of appeal for judicial review of the agency’s decision shall be filed with the Director or his designee.	Add subsection “e” to inform that requests for hearings and appeals for review and reconsideration and a notice of appeal for judicial review of a Hearing Officer’s final decision or final decision on review and reconsideration be filed with the Director to be consistent with similar regulations under the Act.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
4VAC25-130-846.14	N/A	Individuals of a corporate permittee may be subject the individual civil penalty assessment under this Part. The penalty shall not exceed \$5,000 for each violation.	This rule is amended to meet the requirements of HB 2573, enacted as emergency legislation in Chapter 3 of the 2005 Virginia Acts of Assembly. The maximum civil penalty was increased from \$5,000 to \$70,000 for a violation that resulted in injury or a fatality of a person.

**Alternatives**

*Please describe all viable alternatives to the proposed regulatory action that have been or will be considered to meet the essential purpose of the action.*

Amendments to sections dealing with administrative hearings update cross references to the Virginia Administrative Process Act to reflect the new numbering system after recodification. Amendments to sections dealing with administrative review and judicial appeal are intended to provide direction as to where requests should be filed. The alternative of not amending these sections would have left unresolved inconsistency and uncertainty in the administrative/judicial review processes for our customers.

Sections dealing with civil penalties are being amended in response to the 2005 Virginia Acts of Assembly (HB 2573). DMME has no alternative to this action that would meet this mandate. In implementing these changes, DMME is proposing to use a point system consistent with our system for calculating other civil penalties. This point system, which is already familiar to our customers, is considered better than alternatives such as a new or less familiar system.

Sections dealing with subsidence and thick overburden are being amended to assure consistency with federal regulations. No other alternative would meet the requirement that Virginia’s regulations are as effective as, but no more restrictive than, the related federal regulations.

## Family impact

*Assess the potential impact of the proposed regulatory action on the institution of the family and family stability.*

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These regulatory changes are designed to provide current information regarding the administrative hearing process; to allow natural stream channel restoration design; to ensure regulations regarding subsidence are consistent with the federal rules; to ensure regulations regarding thick overburden are consistent with the federal rules; and to revise the civil penalty system to address violations that result in personal injury or fatality. The amendments are being promulgated as part of the recommendations from a Department of Mines, Minerals and Energy report of a coal mining accident in Wise County that resulted in the death of a three-year old child. By ensuring consistency and strengthening penalties for violations, the amendments will increase the safety and welfare of families in areas near coal mines.